



**Odinga & another v Independent Electoral and Boundaries Commission
& 2 others; Kanjama (Intended Amicus Curiae) (Election Petition
1 of 2017) [2017] KESC 27 (KLR) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral and
Boundaries Commission & 2 others & Charles Kanjama [2017] eKLR*

Neutral citation: [2017] KESC 27 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITION 1 OF 2017**

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

AUGUST 27, 2017

BETWEEN

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**THE CHAIRPERSON INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

H.E UHURU MUIGAI KENYATTA 3RD RESPONDENT

AND

CHARLES KANJAMA INTENDED AMICUS CURIAE

**Admission of a person as amicus curiae in a matter before the Supreme Court is not a sufficient
ground for admission in a subsequent suit**

Reported by Kakai Toili

*Civil Practice and Procedure – suits – parties to a suit – amicus curiae - whether admission of a person as an
amicus in a matter before the Supreme Court was a sufficient ground for admission in a subsequent suit.*



Brief facts

The applicant filed the instant application seeking joinder to the petition as *amicus curiae*. The applicant stated that he sought to assist the court with the interpretation and application of relevant constitutional principles, electoral law, computer information systems, accounting and governance auditing and any other area his expertise would be required. The applicant claimed that he had previously been enjoined as *amicus curiae* in *Supreme Court Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, where his submissions were substantially relied on and could guide the instant court in the matters he had indicated.

Issues

- i. Whether admission of a person as an *amicus* in a matter before the Supreme Court was a sufficient ground for admission in a subsequent suit.

Held

1. The court took judicial notice that the applicant was its officer, being an advocate of the High Court. He was a renowned constitutional lawyer and it was the basis upon which he was admitted as an *amicus* in *Supreme Court Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR. In the instant petition, the court was unconvinced that the applicant possessed sufficient expertise to address the court on the technological issues. The court did not require a person with a legal background, as his primary professional discipline, which the applicant was, but a technocrat in information technology and systems, which was a secondary discipline possessed by the applicant.
2. The fact that a person was previously admitted as an *amicus* in a matter before the court was not a sufficient ground for admission in a subsequent suit as each case was determined on its own merit and unique issues and circumstances.

Application dismissed.

Citations

Cases

Kenya

1. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

None referred to

Advocates

None mentioned

RULING

1. This is a notice of motion application dated and filed on the August 25, 2010, seeking joinder to the petition as *amicus curiae*.
2. The applicant seeks the following orders:
 - (a) That the application be certified as urgent and heard ex-parte in the first instance;



- (b) That this honorable court be pleased to grant leave to Charles Kanjama to be enjoined as *amicus curiae* in the proceeding of the presidential election petition herein, and to be represented by the firm of Muma & Kanjama Advocates;
 - (c) That once leave to be enjoined as *amicus curiae* is granted, this honorable court be pleased to grant leave to the *amicus curiae* to present both oral and written arguments during the hearing and determination of the presidential election petition herein restricted to the following matters, namely; Burden and standard of proof – need for specification electoral irregularities: the constitutional & statutory standards managing electoral timelines context and application of information & communication technology verification of tallying and transmission of results *interlocutory applications, scrutiny & recount in a limited frame developing the role of *amicus curiae* the public interest quote
 - (d) That in the alternative, the proposed *amicus curiae* be admitted as an interested party and/or intervenor and allowed to participate in the proceedings herein.
 - (e) That the information/evidence contained in the supporting affidavit be the proposed *amicus curiae* be admitted during the hearing of the petition herein.
3. The application is premised on the following grounds summarized ground:
- (i) That the proposed *amicus curiae* is an objective and non-partisan individual with technical competence and expertise in constitution and electoral law; computer information systems; accounting and governance audit and has previously been enjoined as *amicus curiae* in Supreme Court Advisory Opinion on the [Principle of Gender Representation in the National Assembly and the Senate](#) [2012] eKLR, where his submissions were substantially relied on and may guide the honorable court in the matters he has indicated;
 - (ii) That the applicant has a broad personal and professional perspective in the electoral process, from academic, practitioner, commentary and professional perspectives, including also as a voter and an accredited observer in the last two general elections, held in 2013 and 2017, which involvement has reflected his neutrality in the electoral process in general;
 - (iii) That he seeks to assist the court with the interpretation and application of relevant constitutional principles, electoral law, computer information systems, accounting and governance auditing and any other area his expertise will be required.
4. The application is supported his affidavit dated August 23, 2017 in which he reiterates the grounds in the application. He depones that as a practicing advocate, he has engaged in numerous constitutional and electoral disputes representing parties, institutions and bodies of diverse political affiliations.
5. As regards his neutrality, he avers that he has not been approached by any of the principal stakeholders in the petition. That his application is objective, on his own behalf and professional initiative premised on his ability to be non-partisan while guiding the court in assessing competing claims and evidence.
6. In addition to his legal competencies, the applicant depones that he is a governance expert having qualified as a Certified Public Secretary (CPS), an accredited auditor and a registered and practicing member of the Certified Public Secretaries of Kenya (ICPSK), and will able assist the court in determining issues revolving around tallying, counting and transmission of the results.
7. It is his testimony that he has worked as a computer programmer and information and technology trainer at Strathmore College and has trained with the Institute for Management of Information Systems (IMIS) attaining a higher diploma.



8. He depones that he is the vice-chairperson of the Law Society of Kenya (LSK) Nairobi Branch, where he served as an observer, and has been accorded the opportunity to get involved in informative discussions with advocates, attend seminars and be exposed to publications relating to elections. Furthermore, he represented LSK in the 2013 petition.
9. He avers that as the vice chairperson of the Kenya Christian Professional Forum (KCPF) a body focused on advocacy and networking on matters of life, family, religion and governance, which partners with the Kenya Conference of Catholic Bishops (KCCB), the National Council of Churches of Kenya (NCCCK) and the Evangelical Alliance of Kenya (EAK) bodies which have been involved in mediation during the electoral disputes, and as observers in the election, he is able to bring a unique perspective on issues of public interest.
10. In his written submissions, he states that he has met the legal threshold for admission as *amicus curiae* as set down in the case of [Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others \[2015\] eKLR](#).
11. The petitioners oppose the application by way of a replying affidavit by Raila Odinga dated August 26, 2017. He disabuses the applicant's 'alleged' expertise in electoral process and avers that general expertise in law does not suffice for admission of one as an amicus.
12. It is also the petitioners' contention that the applicant seeks to introduce fresh evidence which not part of the record. He contends that his joinder will be an abuse of court process.
13. Lastly, that with the strict constitutional timelines, the interests of justice and time would not be served by admission of the applicant as amicus.
14. The 1st and 2nd respondents filed a replying affidavit and written submissions, both dated August 25, 2017. The replying affidavit is sworn by Moses Kipkogei, senior legal manager of the 1st respondent in which he opposes the application. He depones that the applicant has not demonstrated or established any field, expertise and/or knowledge that he would be submitting to aid the court in determining the petition before the court.
15. The 3rd respondent filed a replying affidavit, deponed by Davis Kimutai Chirchir and written submissions. He opposes the application for joinder and avers that the applicant does not meet the threshold for admission of an *amicus*. It is averred that the issues the applicant proposes to submit before this court are matters that have been extensively addressed in other courts already, hence already settled. That there are no exceptional arguments and/or insights that the applicant, Mr Kanjama can introduce to the case on the matters he wants to address as outlined in his submissions.

Determination

16. The jurisprudence as regards admission of amicus is settled and has been referred to in a similar application before this court in this matter, in the application by the Law Society of Kenya.
17. While admission of an amicus is at the discretion of the court, we note that all parties in the petitions have opposed the admission of the applicant, Mr Charles Kanjama, as an amicus. Particularly, that he does not possess the expertise he alleges to have but his is of a general nature. Further, and with particular reference to the petitioners, that he seeks to introduce new issues not advanced by the parties.
18. The court takes judicial notice that the applicant is its officer, being an advocate of the High Court. He is a renowned constitutional lawyer and it is the basis upon which he was admitted as an amicus



in the matter he alluded to, being Supreme Court Advisory Opinion on the *Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

19. On the contrary, in the petition before us, we are unconvinced that the applicant possess sufficient expertise to address the court on the technological issues. The court holds that it does not require a person with a legal background, as his primary professional discipline, which the applicant is, but a technocrat in information technology and systems, which is a secondary discipline possessed by the applicant.
20. We reiterate that the fact one was previously admitted as an amicus in a matter before this court is not a sufficient ground for admission in a subsequent suit as each case is determined on its own merit and unique issues and circumstances.
21. The upshot is that the application for admission as amicus is hereby dismissed.

Orders Accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST 2017

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DK MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P.M. MWILU

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DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

MK IBRAHIM

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JUSTICE OF THE SUPREME COURT**

JB OJWANG

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JUSTICE OF THE SUPREME COURT

SC WANJALA

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JUSTICE OF THE SUPREME COURT

